

**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: InstaDial Technologies Corp., Re, 2005 ABASC 965**

**Date: 20051207**

**Docket: E/00332**

*Securities Act, R.S.A. 2000, c. S-4*

**InstaDial Technologies Corp., Vern Smith, Joseph Edward Allen,  
Douglas Atwell, Syed Kabir**

**Panel:** Stephen R. Murison, Vice-Chair  
David W. Betts, CFA, Member  
Roderick J. McLeod, Q.C., Member

**Appearing:** Allison M. Neapole and  
Diane Volk  
For Commission Staff

**Dates of Hearing:** 26, 27 and 28 September 2005

**Date of Decision:** 07 December 2005

## **I. OVERVIEW OF THE PROCEEDINGS**

[1] This case involved distributions of securities into Alberta and certain activities related to those distributions which were alleged to have contravened the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") and been contrary to the public interest.

[2] The allegations are set out in a notice of hearing originally issued on 21 January 2005 and subsequently twice amended, most recently on 17 August 2005. References below to the "Notice of Hearing" are to that final version. Stated briefly, and excluding certain allegations that they did not pursue, staff ("Staff") of the Alberta Securities Commission (the "Commission") alleged the following:

- InstaDial Technologies Corp. ("InstaDial"), Vern Smith, president of InstaDial ("Smith"), Joseph Edward Allen ("Allen"), Douglas Atwell ("Atwell") and Syed Kabir ("Kabir") (collectively, the "Respondents") engaged in illegal distributions of InstaDial common shares in Alberta;
- the Respondents made misrepresentations or prohibited representations to investors with the intention of effecting a trade in a security;
- Allen, Atwell and Kabir acted as advisors without being registered to do so;
- Allen, Atwell and Kabir made representations relating to the market price of a security with no reasonable belief that there was a market for the security not made, created or controlled by them;
- Smith and InstaDial made misrepresentations to the Commission in documents required to be filed under Alberta securities laws;
- Smith and InstaDial contravened an outstanding Commission cease trade order by issuing a stock dividend; and
- as a result of the foregoing, the Respondents acted contrary to the public interest.

[3] In consequence of this alleged misconduct, Staff sought orders against each Respondent.

[4] The hearing into the allegations (the "Hearing") took place on 26, 27 and 28 September 2005. None of the Respondents nor their counsel was present in person at the Hearing. We were, however, satisfied that service of notice of the proceedings had been sufficient in the circumstances (as discussed below) and that it was appropriate for the Hearing to go forward. In the course of the Hearing we received and considered: a written opening statement and oral submissions by counsel for Staff; a letter from

InstaDial signed by Smith; documentary evidence; and the testimony of eight witnesses (two Staff investigators and six Alberta-resident investors).

[5] Our decision and reasons follow.

## **II. SUMMARY OF DECISION**

[6] We conclude from our analysis of the evidence and the submissions that many (but not all) of the allegations are proved. Each of the Respondents contravened Alberta securities laws and acted contrary to the public interest.

[7] We find that each of the Respondents engaged in, or bore responsibility for, trading and distributing InstaDial shares in Alberta in contravention of the registration and prospectus requirements of the Act and without benefit of an exemption from those requirements. Each of the Respondents made misrepresentations to investors with the intention of effecting trades in InstaDial shares. Smith and InstaDial also made misrepresentations in documents filed with the Commission. All those acts were, as alleged, contrary to Alberta securities laws and the public interest.

[8] Not all of Staff's allegations were proved. We do not find there to have been: a breach by Smith and InstaDial of a cease trade order that had been issued by the Commission on 21 January 2005 and extended indefinitely on 4 February 2005 (the "Cease Trade Order"); prohibited representations relating to the listing of InstaDial shares or to a market price in the absence of a reasonable belief in the genuineness of the market; or activity by certain Respondents as unregistered advisors.

[9] Given the seriousness of the allegations that were proved, we find it in the public interest to order sanctions, which we now summarize.

[10] InstaDial must:

- cease trading in any security and cannot use any exemption under Alberta securities laws until such time, if any, as it files and obtains a receipt for a prospectus in Alberta; and
- pay a \$50 000 administrative penalty.

[11] Allen must:

- cease trading in any security and cannot use any exemption under Alberta securities laws, for ten years; and
- pay a \$30 000 administrative penalty.

[12] Smith must:

- cease trading in any security and cannot use any exemption under Alberta securities laws, for five years;

- not serve as a director or officer of an issuer in Alberta, for five years; and
- pay a \$25 000 administrative penalty.

[13] Atwell and Kabir each must:

- cease trading in any security and cannot use any exemption under Alberta securities laws, for three years; and
- pay a \$15 000 administrative penalty.

[14] In addition to these sanctions in the public interest, we order that each Respondent make a payment, in the amount indicated, toward the costs of the investigation: InstaDial – \$7 500; Smith – \$5 000; Allen – \$5 000; Atwell – \$2 500; and Kabir – \$2 500.

### **III. PROCEDURAL MATTER**

[15] As indicated, none of Respondents was present at the Hearing nor represented by counsel. Fairness to respondents demands that reasonable efforts be made to inform them of the allegations against them and to give them an opportunity to respond. At the same time, there is without doubt a public interest in seeing serious allegations of capital market misconduct resolved in a timely manner, with a view to protecting the investing public and sustaining confidence in the capital market. While a respondent is not obliged to appear to answer allegations nor to be represented by legal counsel, the panel sought, at the outset of the Hearing, to satisfy itself that Staff had made reasonable efforts to inform the Respondents.

[16] Section 217 of the Act provides for service of documents by physical means (personal delivery or prepaid post) or by electronic means (such as fax). Service is deemed to have been effected, unless the contrary is proved, on the seventh day from the sending, by prepaid post, to the last known address of the recipient.

[17] We discern from the Act a legislative attempt to balance, fairly but practically, the interests of respondents to a proceeding with the interests of the public generally. As an example, subsection 217(4) provides that material need not be sent again if it is sent by prepaid post but returned three times "because the person or company cannot be found". The essential point, we believe, is that Staff must be diligent in their efforts to serve a notice of hearing on a respondent. We do not, however, believe that fairness and the public interest require a proceeding to be abandoned or deferred indefinitely if such diligent efforts meet with no success. Such a position would, in our view, be inconsistent with the broader public interest in having allegations of misconduct dealt with in a reasonably timely manner, or at all. We do not believe that securities regulatory proceedings need be compromised because respondents make themselves unavailable, are unresponsive or cannot be found.

[18] We are satisfied that InstaDial and Smith were served with the Notice of Hearing and knew of this Hearing and the case alleged against them. Conclusive evidence of this

is the letter tendered (and accepted by us) as a "closing argument" by InstaDial, signed by Smith.

[19] Under section 217 of the Act, service of an earlier version of the Notice of Hearing was deemed effective on Allen after it was sent to him at what Staff believed to be his home address in Toronto, Ontario and not returned. In our view, later unsuccessful attempts to serve Allen do not detract from his having had notice that these proceedings had been launched and that there were allegations against him. With that information, we believe that Allen assumed a responsibility to keep himself informed, whether by monitoring the Commission's public website (on which the later version of the Notice of Hearing was published) or otherwise. Whether Allen did in fact keep himself informed we do not know, but his silence does not in our view undo the validity of the original service on him.

[20] Staff advised that they sent the relevant material by prepaid post and registered mail to Atwell and Kabir at a Toronto address which Staff had reason (based on their investigation) to believe were business premises from which those Respondents and Allen carried on the activities giving rise to Staff's allegations. This material was, however, returned three times, apparently unopened.

[21] We consider that InstaDial, Smith and Allen were properly, successfully and effectively served. We did not reach a similar conclusion with respect to the success of service on the remaining two Respondents, Atwell and Kabir. However, we are satisfied that Staff acted with appropriate and sufficient diligence to satisfy the legislative intent and that service was in that sense sufficient. We therefore conclude that it was in the public interest for the Hearing to proceed against all the Respondents.

#### **IV. THE PARTIES**

##### **A. InstaDial**

[22] InstaDial is an Ontario corporation. Some documentary evidence indicated a Mississauga, Ontario address; other documentary evidence indicated a downtown Toronto address. We are not troubled by this difference.

[23] Company publicity indicates that it "provides technology solutions utilizing Voice over IP (VOIP)" internet communication technology. Other than marketing material provided to investors and entered into evidence, we have no evidence as to the scale and operation of InstaDial's business, or its past or current financial position. Nor have we information as to the extent, if any, to which InstaDial benefited from the distributions of its shares.

[24] Staff alleged that InstaDial is not a "reporting issuer", as defined in subsection 1(ccc) of the Act, or under the securities laws of any other Canadian jurisdiction. This is significant because securities distributed in reliance on certain exemptions from Alberta

securities laws, as purportedly done here, may not be freely traded by the investor who acquires them in the distribution until after the issuer has become a reporting issuer.

[25] Two common ways for a company to become a reporting issuer are: (i) obtaining a receipt for a prospectus; or (ii) having securities listed on a "recognized" exchange. The evidence indicated that InstaDial qualified in neither category. First, there was no evidence of any prospectus receipt. Second, although there was some indication linking InstaDial shares to an over-the-counter or other securities trading or quotation system possibly connected to NASDAQ in the United States, there was no evidence of a listing on a recognized exchange.

[26] Documentary evidence showed the company not to be a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec or Nova Scotia. There was no evidence that it was a reporting issuer in any of the remaining six Canadian jurisdictions.

[27] Accordingly, we conclude from the evidence that InstaDial was not a reporting issuer at or prior to the time of the Hearing.

[28] InstaDial was also not a registrant under the securities laws of Alberta.

## **B. The Individual Respondents**

[29] Information about the individual Respondents gleaned from the written evidence and testimony of the witnesses is somewhat sketchy.

### **1. Smith**

[30] Public records in Ontario name Smith as InstaDial's sole director and officer, and locate him in London, Ontario.

[31] There was essentially no evidence as to Smith's background, except that Smith was not registered under Alberta securities laws.

[32] There was limited evidence concerning Smith's direct role relating to the distributions of InstaDial shares. There was testimony concerning information he provided directly to at least one Alberta investor, and documentary evidence in the form of filings under Alberta securities laws.

[33] There was no evidence as to whether, or to what extent, Smith benefited financially from sales of InstaDial shares.

### **2. Allen**

[34] Allen, it appears, operated under the business name "J. Allen Capital", for which documentary evidence gives a Toronto address and telephone and fax numbers. Some of

the documentary evidence showed the same address and telephone number for InstaDial. Witnesses testified to having communicated with Allen, or associates of Allen, via the telephone or fax number associated with the J. Allen Capital address.

[35] Allen was not registered under the securities laws of Alberta nor, apparently, of any other Canadian jurisdiction. It appears that Allen, at one time a registrant under the securities laws of Ontario, was denied re-registration by the Ontario Securities Commission as being "not suitable".

[36] The evidence is that in 2004 and 2005 Allen was engaged in the business of selling InstaDial shares from Toronto, with the assistance of several other individuals. The mode of operation seems to have been to telephone prospective investors and encourage them to buy securities. The testimony we heard from certain Alberta investors suggested that the selling efforts in respect of shares of InstaDial were persistent.

[37] The evidence also directly identifies Allen with InstaDial. A page from the InstaDial website, apparently printed on 29 July 2005 and entered into evidence, sets out contact information as follows:

InstaDial Technologies Corp.  
Investor Relations  
Joseph Allen  
Phone: (416) 848-0900  
Email: investorrelations@instadial.com

[38] That is the same telephone number associated with J. Allen Capital and to which witnesses referred in their testimony, as noted elsewhere in this decision.

[39] There was no evidence as to how or to what extent, if any, Allen or J. Allen Capital was financially remunerated for the activities alleged.

### **3. Atwell and Kabir**

[40] Atwell and Kabir were alleged to be associates of Allen in this business of selling securities by telephone. From the witness testimony we heard, their role appears to have been front-line solicitation but in a role subordinate to Allen's. It appears that Atwell and Kabir, among others, first approached and solicited an investment in InstaDial shares from the Alberta investors who testified before us. In some cases there was follow-up contact with those investors by Allen or Smith.

[41] Neither Atwell nor Kabir was registered under Alberta securities laws. Again, there was no evidence as to their personal financial remuneration.

## **V. SALES OF INSTADIAL SHARES**

### **A. Selling Activity**

[42] During 2004 and into 2005, Alberta-resident investors were contacted by telephone by someone outside Alberta and encouraged to buy shares on offer from InstaDial.

[43] We heard from six of those investors, each of whom purchased InstaDial shares between approximately March and December 2004. Some investors made purchases on two or three separate occasions.

[44] There was no apparent link among any of these investors and (as will be seen) no commonality to their geographic location, profession or age. None of them seemed to know exactly how they came to be contacted, although some had apparently bought unrelated securities in response to earlier, different solicitations.

[45] The telephone calls were followed by written material describing InstaDial's VOIP business, as well as trading information about InstaDial shares (price and volume history) that appears to have been taken from an electronic screen display on which "NASDAQ" appears. The original source of this trading information, and what exchange or marketplace was illustrated, was unclear.

[46] Investors in this selling effort were invited to buy InstaDial common shares at a price of C\$2.50 per share. They were told that the shares were then trading in the United States at a higher price in the range of approximately US\$3.00 to US\$6.75. Despite the variation in the information given to the different witnesses, the C\$2.50 offering price did not change.

[47] The offering was presented as what is commonly (if loosely) referred to as a "private placement". As such, no prospectus was provided. It seems to have been indicated (or anticipated by the investors) that the securities would be subject to a temporary resale restriction or "hold period". We heard testimony from investors that most recalled being told initially that this hold period would be 12 months. However, in subsequent discussions when the investors we heard from were being invited to make a second investment, some of them were given to understand that the remaining hold period had ended or diminished to a matter of a few weeks.

[48] It seems that once a prospective investor responded favourably to the telephone solicitation, a partially completed subscription form was rapidly sent and arrangements made for the delivery (by prepaid courier) of the investor's cheque for the subscription price.

[49] The subscription form was a two-page printed document with spaces left blank for the number of shares bought, names, dates, and the specification of the legal exemption

(from prospectus and registration requirements) under which the transaction was being effected. Appended to this form was a Schedule D, which purported to set out the qualifications for various exemptions, including what is generally known as the "accredited investor" exemption. This documentation had a formal, legalistic appearance.

[50] There was evidence of incomplete documents being signed and documentation completed (or substituted) after the fact. Accordingly, it is unclear whether or when each investor actually received and signed the full set of documentation. We also heard testimony of the manner in which various of the Respondents dealt with investor concerns about some of this documentation. These matters are discussed below.

[51] The evidence was that investors also received, in due course, a share certificate or certificates. The certificates bore a notation (printed or typewritten) to the effect that the shares were subject to a resale restriction. The accuracy and content of the notations were not in issue.

[52] In respect of sales of InstaDial shares to Alberta investors, InstaDial filed with the Commission the reports of exempt distribution (signed by Smith) required by Alberta securities laws. Not all of these filings appear to have been made within the time prescribed. However, the content, not the timing, of those reports formed the basis for certain of Staff's allegations.

[53] The Notice of Hearing alleged, presumably based on those reports, that InstaDial shares were sold to at least 126 Alberta residents who paid a total of over \$500 000 for the shares. The reports indicated that all of the sales, including those to the investors who testified before us, were made in reliance on the accredited investor exemption.

[54] None of the investors who testified had disposed of his InstaDial shares. One investor testified to having unsuccessfully sought a refund from InstaDial.

[55] As will be seen, Alberta holders cannot legally resell their InstaDial shares for two reasons. First, this Commission issued the Cease Trade Order to protect the public interest pending the conclusion of this Hearing. Second, even without that Cease Trade Order the resale restriction attaching to the InstaDial shares when they were issued was, and remains, indefinite.

## **B. Legal Nature and Attributes of Selling Activity**

### **1. The Law**

[56] Under Alberta securities laws (which in this respect are similar to the securities laws of most Canadian jurisdictions), two key principles govern the trading and distribution of securities:

- A "trade" (subsection 1(jjj) of the Act) includes a sale of securities "for valuable consideration" or "an act ... in furtherance" of such a sale. Paragraph 75(1)(a) of the Act states that trades may only be made by a person or company registered with the Executive Director of the Commission (unless an exemption is available, as discussed below). The registration process permits an assessment of an applicant's suitability for registration and provides regulatory oversight after registration.
- Trades of newly-issued securities are "distributions" (subsection 1(p) of the Act), requiring a receipted prospectus unless an exemption is available. That prospectus must contain certified "full, true and plain disclosure of all material facts relating to the securities" to be distributed and, by necessary implication, relating to the issuer (paragraph 113(1)(a) of the Act).

[57] The registration requirement is designed to ensure that securities trade in a manner consistent with the integrity of the capital market and that an investor has the benefit of informed, competent advice from a person who considers the investor's resources, objectives and risk tolerance. The prospectus disclosure requirement is designed to help investors make an informed investment decision.

[58] Securities laws provide a variety of exemptions from either or both the registration and prospectus requirements. Exemptions are in many cases crafted with a view to removing unwarranted impediments to companies raising capital while maintaining investor protection and market fairness.

[59] One exemption permits the distribution of securities, without a prospectus and without registration, to "accredited investors". The relevant provisions have changed somewhat since the time of the events in question but the underlying purpose and framework of those provisions remain unchanged. Throughout this decision we refer to the provisions as they were at the relevant time.

[60] In Alberta in 2004, a non-registered individual could be an accredited investor for the purposes of section 1.1 of then Multilateral Instrument 45-103 *Capital Raising Exemptions* ("MI 45-103") under one of the following branches of the definition:

"accredited investor" means

...

- (k) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds \$1,000,000,
- (l) an individual whose net income before taxes exceeded \$200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded \$300,000 in each of the two most recent years and who, in

either case, reasonably expects to exceed that net income level in the current year,

- (m) a person or company, other than a mutual fund or non-redeemable investment fund, that, either alone or with a spouse, has net assets of at least \$5,000,000, and unless the person or company is an individual, that amount is shown on its most recently prepared financial statements,

...

[61] Responsibility for ensuring that a registration or prospectus exemption is available rests with the person seeking to rely on the exemption – the issuer or other seller of securities. Section 1.3 of the Companion Policy to MI 45-103 offered guidance as to the nature and extent of that obligation. Factual representations made by a prospective purchaser could be relied upon only if the seller "has no reasonable grounds to believe that those representations are false". With specific reference to the accredited investor exemption, a prospective purchaser's positive factual representation as to the quantum of past and expected future income levels may be relied upon. However, "the issuer should not rely merely on the representation: 'I am an accredited investor'". In short, the seller of securities seeking to rely on the accredited investor exemption has a duty to make a reasonable, serious effort to ensure that the purchaser is indeed an accredited investor.

[62] The substantial financial resources required for qualification as an accredited investor delineate those who might be presumed to have financial resources sufficient either to enable them to obtain information and advice before making an investment decision or to bear the risk and potential loss associated with an investment. The restrictions on the exemption are meant to protect those who do not qualify from the risks that can accompany an investment made without prospectus disclosure and the involvement of a registrant. Contrary to what one of the witnesses apparently suspected at the time, the restrictions are not designed to reserve choice investments for "the very rich". The availability of a prospectus or registration exemption is not in any way indicative of how successful an investment will be.

[63] Securities acquired under a prospectus or registration exemption may not be freely tradeable by the purchaser. Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102"), as it applied in Alberta in 2004, set out the restrictions applicable to resales of securities acquired by an investor under an offering made in reliance on the "accredited investor" exemption. The effect is that, unless and until the issuer of the securities becomes a reporting issuer, the resale restriction continues indefinitely.

[64] Another exemption available under MI 45-103 allowed the issuer to provide investors with a different type of information disclosure document – an "offering memorandum" – in lieu of a prospectus. Resale restrictions may also apply to securities acquired in reliance on this exemption.

## **2. Circumstances of This Case**

[65] Based on the evidence detailed below, the sales of InstaDial shares to Alberta investors were "trades". There is no evidence that such shares originated from any source other than InstaDial's treasury, as previously unissued shares. Therefore, the trades of InstaDial shares also constituted "distributions".

[66] In their written "closing submissions", InstaDial and Smith made reference to both Part 3 ("accredited investor" exemption) and Part 4 ("offering memorandum" exemption) of MI 45-103. The latter reference appears to have been a mistake. The distribution reports signed by Smith and filed by InstaDial in respect of all the trades indicated that InstaDial was relying on a branch of the accredited investor exemption, not the offering memorandum exemption. There was no evidence of any offering memorandum being provided to the six investors from whom we heard. Accordingly, there was no basis for reliance on the offering memorandum exemption.

[67] The legality or illegality of the distributions of InstaDial shares to Alberta investors turns on whether the accredited investor exemption was relied upon legitimately.

### **C. Testimony of Investors**

[68] We heard from six Alberta-resident investors in InstaDial. Each of them was a working person. All attested to relatively modest financial resources and little, if any, experience in the capital market. We summarize their respective testimony.

#### **1. Investor AAA**

[69] AAA (we will refer to each of the investor witnesses in this fashion, as their names are not pertinent to our findings) was the owner of an automobile repair shop and lived in Edmonton, Alberta. This investor received a telephone call from someone in Toronto soliciting AAA's investment in InstaDial shares. He thought he was told he could sell his shares at any time after receiving the certificate. He testified that the telephone caller did not discuss the accredited investor exemption, nor AAA's financial position.

[70] AAA testified that, after receiving repeated pressuring telephone sales pitches, he agreed to buy 500 InstaDial shares at a cost of \$1 250. He then received by fax a two-page subscription form which, as instructed, he signed and sent back by courier with his payment. He thought that the notation on the form indicating reliance on the accredited investor exemption was already filled in when it was first sent to him. Regardless of the timing, he told us that he was not the person who made the notation. He did not receive the remainder of the documents, including the portions setting out the tests for accredited investor status, until later.

[71] AAA was subsequently approached again. He thought it was early in 2005, but he was definite that the approach came from Allen. AAA was told that InstaDial shares

were still on offer at the same \$2.50 price. He declined the invitation to make a second investment in InstaDial.

[72] Prior to that second approach, AAA had contacted Heritage Transfer Agency Inc., the transfer agent named on his InstaDial share certificate, to find out when he could, in his words, "cash" his shares. He was apparently told that he could not do so through that firm unless he maintained an account with them.

[73] According to AAA, \$1 250 was a substantial amount of money for him. He also stated that he would not have bought the shares had he known that he would be indefinitely restricted from selling them.

[74] It was clear from his testimony that AAA did not meet any of the accredited investor tests at the time he purchased InstaDial shares.

## **2. Investor BBB**

[75] The second witness, BBB, was a real estate appraiser who resided in Calgary, Alberta.

[76] BBB had been contacted by telephone at his home, from which he operated his business. He testified that he spoke to Allen, Atwell and Smith. BBB understood Allen to be the president of InstaDial (although the documentary evidence showed that its president was Smith, not Allen). The investor also told us that he had spoken to a man who could have been Kabir. A copy of a fax entered into evidence was sent to BBB by "Syed". While BBB did not recall exactly what was said, he stated that they did discuss InstaDial's business and that he received a VOIP modem to try out.

[77] BBB told us that he was informed that InstaDial shares were trading in the United States at a much higher price, ranging from US\$5.10 to US\$7.15. He testified that he searched on the internet and found information that seemed to confirm that the trading price was rising. The documentary evidence included a chart taken from the internet which referred by name to NASDAQ, included a trading symbol apparently applied to InstaDial shares and indicated share prices rising to US\$6.45. As BBB put it, he understood from this chart that "the volume [of trading] wasn't anything spectacular".

[78] BBB had received the entire subscription agreement but he denied filling in the handwritten notation for the accredited investor exemption that appears in the copy of the agreement in evidence.

[79] He recalled a discussion about his financial resources at one point. He said that in the course of such a discussion – with a person whom BBB indicated could have been Kabir and whom he described as "one of the most persistent men I've ever met in my life" – BBB "may have been flippant" and said that he, BBB, was an accredited investor.

[80] According to BBB, were his mother's assets to be combined with his own (an aggregation not contemplated under MI 45-103), he would meet the \$1 million threshold for financial assets under one branch of the accredited investor test but he did not meet any of the branches of the test on his own.

[81] BBB testified that he made three purchases of InstaDial shares (1000, 2000 and 5000 shares) for a total cost of \$20 000. Although he provided documentary evidence for only two of those purchases, the distribution reports filed with the Commission by InstaDial do show the third purchase.

[82] BBB had not endeavoured to resell his shares. He testified that he was aware, in general, of trading restrictions on new shares. However, he stated that he would have been "concerned" had he known that the hold period in this case was indefinite. The amount he had at risk in InstaDial did not seem to alarm him although he testified that it was his largest investment.

[83] It was clear to us that BBB was not an accredited investor when he purchased InstaDial shares, although we note that he may have given the Respondents reason to believe that he was.

### **3. Investor CCC**

[84] The third investor witness, CCC, testified by telephone, having been sworn in by a Commissioner for Oaths in the town of Slave Lake, Alberta.

[85] CCC was a school principal. He was not an active or experienced investor.

[86] He had been contacted by telephone, at the school where he then worked, in May or June of 2004 by Atwell. CCC also dealt with Allen. According to CCC, he was told that he had an opportunity to buy InstaDial shares at a low price and that the shares would be subject to trading restrictions for one year. He did not recall having been given any representations as to the value of the shares.

[87] The investor's recollections were not entirely clear. There may have been some confusion between events relating to his purchase of InstaDial shares and separate dealings with some of the same people in connection with securities of a different issuer. None of this detracted from what we found to be the truthfulness of his testimony.

[88] CCC was certain that his telephone discussions left him with the impression that the InstaDial shares traded on an exchange. The subscription form in evidence confirms that he purchased 1000 InstaDial shares for \$2 500, although the distribution reports filed by InstaDial appear to indicate only 700 shares.

[89] CCC received only part of the subscription agreement, by fax. He signed and returned it. He was unsure whether the notation concerning the accredited investor exemption had been filled in before he received and signed the form. He was clear that he himself did not fill it in before he signed.

[90] According to CCC, he was not asked about his qualification as an accredited investor. He stated, however, that he did tell the person calling that "we don't have a lot of money and don't do large investments".

[91] We accept that CCC was not an accredited investor when he purchased InstaDial shares.

#### **4. Investor DDD**

[92] The fourth investor witness, DDD, managed an oilfield waste disposal plant in Drayton Valley, Alberta. He had been contacted by telephone at work and invited to invest in InstaDial shares at C\$2.50. He was told that the shares were trading in the United States at US\$6.50. He was also told that the InstaDial shares would be subject to trading restrictions for 12 months, after which they could be resold.

[93] DDD was unclear as to the name of the person who had contacted him, eventually (after some prompting) settling on the name "Syed". We give no weight to that element of his testimony.

[94] DDD bought 500 InstaDial shares for \$1 250. Having anticipated a one-year trading restriction, he endeavoured to contact the company towards or after the end of that 12-month period. By then, he told us, the telephone numbers he had been given were disconnected or not being answered. The \$1 250 investment was, he said, "significant for myself".

[95] DDD told us that his intention was to make only a short-term investment. He testified that he told the caller that as well. His own investment experience was apparently very limited, largely investments through an employer plan. He was uncertain what he was asked about his financial resources but he did recall that there were some questions. He testified that he was not the person who filled in the accredited investor notation on his subscription form.

[96] DDD did not qualify as an accredited investor at the time. He was certain that he had not left anyone on the telephone with the impression that he did qualify.

#### **5. Investor EEE**

[97] The fifth investor witness, EEE, was a shop owner from Pincher Creek, Alberta. His investment experience was quite modest and any investing he had done was conducted through financial institutions.

[98] EEE was contacted by telephone in approximately April 2004 by a person named Ivan, calling from Toronto. EEE recalled having been told that InstaDial shares were being offered at C\$2.50 and that they were trading in the United States on NASDAQ at approximately US\$3.00. He was told that there would be a 12-month trading restriction.

[99] He agreed to purchase 1 000 shares for \$2 500. He received and filled out the subscription form, including the accredited investor notation. He testified that it "was the exemption that Ivan told me that I would fall under" and that of the various branches of the exemption, Ivan "instructed me to pick the one which was closest to my situation" as it "was just for their office use only". EEE did not, in fact, meet any of the accredited investor criteria at the time he bought the shares.

[100] We note that two versions of EEE's subscription form were in evidence, suggesting the possibility of it having been altered after he signed and returned it. However, there was insufficient evidence for us to make a finding on this point.

[101] EEE was contacted again one or two months after his purchase and, as he told us, informed that because "Trimark and AGF" would be buying all of the shares of InstaDial, the company was offering extra shares. He agreed to buy an additional 500 shares but was not asked to fill out a subscription agreement for this second purchase. He told us that his impression was that these additional shares could be resold immediately.

[102] EEE characterized his \$3 750 investment as "a fair amount" which, when taken in context, we understood to mean a fairly substantial amount to him. EEE was clear that had he realized there would be an indefinite restriction on reselling the shares, he would not have bought them.

[103] As noted, EEE was not an accredited investor when he purchased InstaDial shares.

## **6. Investor FFF**

[104] The sixth investor witness, FFF, was an electrician from Okotoks, Alberta. His investment experience was limited.

[105] FFF told us that he received a telephone call at work in August 2004 from either Montréal or Toronto. He was told that InstaDial shares were on offer at C\$2.50, that they were trading at approximately US\$6.00 and that they were subject to a 12-month trading restriction. He told us that he characterized that period as "long-term" but agreed to buy 500 InstaDial shares for \$1 250, an amount that he considered not "a big risk". As he put it to us, the amount was "substantial" but losing \$1 250 "wouldn't have killed me".

[106] He did not receive a subscription agreement at that time although he later received one page of an appendix. FFF received a second call advising that InstaDial shares were

still on offer at the same price. He had the impression that this time there would be only a six-week resale restriction. Being at that time (late October or November 2004) in the process of selling a house, he agreed to buy 4 500 shares on the condition that he could pay by post-dated cheque to give time for the proceeds of his house sale to clear.

[107] According to FFF, he was not asked about his financial resources for either share purchase, and he did not meet the tests for qualification as an accredited investor. When he received a document with the accredited investor qualification tests, he recognized that he did not qualify. He telephoned the Toronto number given to him and received a call back from Smith. Smith, he told us, said that InstaDial was allowed a certain number of investors who did not meet the specified exemptions. FFF testified that Smith told him "they" would buy FFF's shares back on the condition that he sign a form of release prepared by or on behalf of Smith. It appears that a letter or other paper was provided to FFF, which he took to a lawyer. The lawyer advised against signing the document because by signing, FFF would make admissions contrary to his own interest.

[108] When asked in the Hearing whether his total investment of \$12 500 was a substantial amount, FFF responded "Oh, yes". When asked whether he would have invested had he known of the indefinite resale restriction, he responded clearly in the negative.

[109] We concluded that FFF was not an accredited investor when he purchased InstaDial shares.

## **7. The Investor Witnesses Generally**

[110] All of the investor witnesses appeared to testify openly and truthfully. We found each to be a credible witness. We believe their testimony concerning their personal financial circumstances and their respective dealings with various of the Respondents.

[111] We find that none of the six investor witnesses was an accredited investor when he purchased InstaDial shares. We do not believe that anyone making honest inquiry of them could reasonably have concluded otherwise, except possibly in the case of investor BBB.

## **D. Findings Concerning Selling Effort**

### **1. Illegal Distributions**

[112] Based on the evidence, we find that InstaDial shares were sold over the telephone to Alberta investors in circumstances in which, absent an exemption, both registration and a prospectus were required. The accredited investor exemption was the only exemption apparently relied upon.

[113] We have found that this exemption was, in fact, unavailable in the case of each of the six investors who testified.

[114] We know that other investors also purchased InstaDial shares because over 120 Alberta transactions appear in the distribution reports filed with the Commission, although in some cases an investor participated in more than one such transaction. Staff did not suggest that the six investors who testified constituted a representative sample. There was evidence that some other investors may have qualified as accredited investors. That may be so. However, instances of compliance, even if proved, do not dispose of the allegations here.

[115] Although there seem to have been efforts to "paper" the transactions in such a way as to give the appearance that the conditions attaching to the accredited investor exemption were taken seriously and complied with, we believe that to have been essentially a sham.

[116] The subscription documentation that purported to demonstrate justified reliance on investors' representations as to their accredited status is not at all persuasive, given the evidence as to how the documentation was presented and handled. Inexperienced or unsophisticated investors were presented with these documents – or portions of the documents – by persistent and seemingly knowledgeable salespersons. We find that investors were instructed to sign and return a subscription form with a key piece of information, the notation concerning the investor's accredited investor status, filled in for them either before or after their signature. We heard the testimony of two investors (EEE and FFF) whose queries or doubts about their qualification as accredited investors met with incorrect or misleading responses that seemed to us intended to downplay the importance of the issue.

[117] In short, in the case of the investors from whom we heard, we do not believe that any serious effort was made to test their qualification for the accredited investor exemption even after the investors themselves raised doubts. As noted, any such serious effort would unquestionably have led to the conclusion that at least five of those investors did not qualify. It follows that there was no reasonable basis for the sellers of InstaDial shares to have concluded that the accredited investor exemption was available in those cases.

[118] Therefore, we conclude that none of the six investor witnesses was an accredited investor at the time of their purchase of InstaDial shares. In the case of at least five of the investors we heard from there was no reasonable basis for the Respondents to have believed that the investors were accredited investors. We find that no serious effort had been made to ensure that each of the investors was an accredited investor. We further find that the accredited investor exemption – the only exemption relied upon – was unavailable for those transactions. The Respondents being unregistered and no prospectus having been filed or receipted, it follows, and we find, that InstaDial shares were sold to the six investor witnesses in contravention of Alberta securities laws.

[119] These were illegal trades and distributions. We turn now to an analysis of who was responsible.

## **2. Responsibility of Each Respondent**

### **(a) No Evidence as to Financial Benefit**

[120] The evidence is that over \$500 000 was raised from Alberta investors in the distributions of InstaDial shares. There was, however, no evidence as to where the money went. The usual expectation in the case of a distribution of treasury securities is that proceeds will go to the issuer. There was no evidence to the contrary in this case nor any evidence that investors were led to expect otherwise, but without positive evidence we cannot conclude that InstaDial benefited financially. We also do not know whether any of the individual Respondents was remunerated or rewarded for their participation in the selling efforts or, indeed, whether any of them had a financial stake in InstaDial.

[121] There was, in short, no evidence as to whether or to what extent any of the Respondents benefited financially from the InstaDial distributions.

[122] However, responsibility does not turn on proof of financial benefit. That factor is irrelevant to our determination of whether any of the Respondents contravened Alberta securities laws or acted contrary to the public interest.

### **(b) InstaDial**

[123] InstaDial clearly bears responsibility for the illegal distributions and the manner in which they were carried out. It was, after all, InstaDial shares from InstaDial's treasury that were being sold. Through its sole director and officer (Smith), InstaDial executed subscription agreements and filed distribution reports with the Commission. InstaDial issued shares and share certificates. InstaDial was neither unaware of the distributions nor a mere passive bystander; it was a full participant. We find that InstaDial illegally traded and distributed its shares.

### **(c) Smith**

[124] The same facts also conclusively demonstrated Smith's responsibility for the illegal distributions. Public records show him as the sole officer and director of InstaDial and, as such, he is responsible for the company's actions. Whatever arrangement there was with Allen, Smith must have been aware of it. Smith clearly knew that InstaDial shares were being sold, as demonstrated by his signature on documents relating to the distributions. Moreover, Smith had direct communication with investors, as was confirmed by the testimony of witnesses.

[125] Given his positions with InstaDial and his direct dealings with investors, we find that Smith himself engaged in the illegal trades and distributions of InstaDial shares.

**(d) Allen**

[126] Allen, in our view, played a highly significant role in this case.

[127] To our knowledge, he was the only one of the Respondents to have been, at one time, a registrant under Ontario securities laws which are, in substance, similar to those in Alberta. As a former registrant he knew, or ought to have known, the significance of prospectuses, registration requirements and exemptions. He would have well understood the importance, in any dealings in securities, of ascertaining the applicable law and complying with it.

[128] We are satisfied from the evidence that Allen was in the business of raising capital by selling securities. He held himself out as the "investor relations" contact for Instadial. He conducted a sales operation from the Toronto address referred to earlier. Witness testimony and documentary evidence showed that much of the communication with investors went to and from that address. We are in no doubt that Allen engaged sales personnel, including Atwell and Kabir, to help staff that operation (we discuss below some evidence that confirms that, specifically in the case of Kabir).

[129] We conclude that Allen was the guiding mind behind the illegal distributions of InstaDial shares. We believe that he orchestrated an unscrupulous marketing campaign to sell securities in disregard of legal requirements and restrictions and that he did so without concern for the effect on the purchasers. The evidence is insufficient for us to conclude that this campaign specifically targeted unaccredited investors. We do note, however, that Allen's marketing effort did not in any serious manner attempt to exclude unaccredited investors.

[130] We find that Allen illegally traded and distributed InstaDial shares.

**(e) Atwell**

[131] Concerning Atwell, we conclude from the evidence that he was active in the marketing campaign and that he did not take seriously the requirements and restrictions that applied to his efforts to sell InstaDial shares to Alberta investors. Atwell was expressly named by investor witnesses. He communicated directly with investors and spoke to them by telephone.

[132] We believe that Atwell was acting under the guidance or direction of Allen. However, that did not preclude him from considering the propriety of the operation and his role in it and it does not diminish Atwell's responsibility for his own actions.

[133] We find that Atwell engaged in the illegal trades and distributions of InstaDial shares.

(f) **Kabir**

[134] Everything we said above about Atwell applies equally to the person called "Syed". The roles played by these two individuals in the illegal trades and distributions appeared from the evidence to be substantially identical. A witness described Syed's manner as particularly persistent. The name Syed came up in both oral and documentary evidence.

[135] We conclude that this Syed was as responsible as Atwell for the illegal trades and distributions.

[136] But who is Syed? Staff alleged that he is the Respondent Syed Kabir. An affidavit of a Staff investigator included an exhibit from an external source in which Syed Kabir was named as an employee of Allen, as well as the investigator's own statement as to his belief that "Syed" was Syed Kabir.

[137] In addition, we accepted into evidence an extract from a transcript of a proceeding which was then before the Ontario Securities Commission. That Ontario proceeding was unrelated to the case before us but Staff informed this panel that the Ontario proceeding involved allegations relating to alleged securities trading at approximately the same time as the InstaDial distributions and that Allen was also a respondent in the Ontario proceeding. Apart from those factors, the relevance of the Ontario proceeding to this case was doubtful. Staff acknowledged as much. Accordingly, we assigned no weight to the Ontario proceeding or transcript in determining whether Alberta securities laws were contravened, whether there was conduct contrary to the public interest and whether it is in the public interest to order any sanctions in these proceedings.

[138] We did, however, consider the Ontario transcript for a much narrower purpose. It provided confirmatory evidence as to the identification of "Syed", information that we concluded was clearly relevant and that could be used without unfair prejudice to any Respondent in these proceedings. That information appeared in testimony by Allen under cross-examination at pages 184-185 and 202 of the Ontario transcript (the cross-examiner's questions being indicated by the notation "Q" and Allen's responses by "A"):

Q. ...did you hire staff?

A. Yes.

Q. And those staff members included Mr. [S, a name not relevant to this Hearing], didn't they?

A. Yes.

...

Q. And Mr. Syed Kabir?

A. Yes.

...

Q. ...Was there another Syed, other than Syed Kabir, working for you?

A. No.

[139] This evidence we accept in confirmation that, as indicated in other evidence already before us, the "Syed" whose name we saw and heard in other evidence was the Syed Kabir named as a Respondent. As already indicated, our comments above concerning the Respondent Atwell are therefore also applicable to the Respondent Kabir. We find that Kabir engaged in the illegal trades and distributions of InstaDial shares.

**(g) The Respondents Generally**

[140] In summary, we find that InstaDial and each of the individual Respondents illegally engaged in trades and distributions of InstaDial shares without benefit of registration, a prospectus or a registration and prospectus exemption.

**3. Misrepresentations and Prohibited Representations to Investors**

**(a) Legal Provisions**

[141] In addition to alleging that the sales of InstaDial shares constituted illegal trades and distributions, Staff alleged that each Respondent had further contravened the Act by making misrepresentations or prohibited representations. The allegations all pertained to the distributions of InstaDial shares.

[142] Subsection 92(3) of the Act prohibits the making of certain representations "with the intention of effecting a trade in a security". Thus, where that intention is present, paragraph 92(3)(a) prohibits "any undertaking [given with that intention] relating to the future value or price of the security". Paragraph 92(3)(b) bars any representation – true or not – given with that intention without the Executive Director's written permission "that the security will be listed on any exchange or quoted on any quotation and trade reporting system" unless (among other conditions) that listing or quotation arrangement already exists. Paragraph 92(3)(c) prohibits "a statement [given with that intention] that the person or company knows or ought reasonably to know is a misrepresentation".

[143] A "misrepresentation" is defined by subsection 1(ii) of the Act as:

- (i) an untrue statement of a material fact, or
- (ii) an omission to state a material fact that is required to be stated, or
- (iii) an omission to state a material fact that is necessary to be stated in order for a statement not to be misleading;

[144] As then defined in subsection 1(gg) of the Act, a "material fact" was:

a fact that significantly affects or would reasonably be expected to have a significant effect on the market price or value of the securities;

[145] Subsection 92(4) of the Act contains further prohibitions on representations:

- (4) No person shall represent that the person is offering to trade in a security  
...  
(b) at a price related to the market price,

unless the person reasonably believes that a market for the security exists that is not made, created or controlled by him, the person's employer or an affiliate or by a person or company for whom the person is acting in the transaction.

[146] Staff alleged a variety of prohibited representations and misrepresentations on the part of the Respondents.

**(b) Intention of Effecting a Trade**

[147] There was considerable evidence of written and oral communications between Respondents and purchasers, or prospective purchasers, of InstaDial shares. Some of that communication was clearly "post-investment" and not helpful in determining the sellers' intentions before the sales were made: the delivery of share certificates; the filing of distribution reports; and communication concerning one investor's request for a refund of his money. However, we believe that all of the communication from a Respondent to a prospective investor, up to the time the investor committed to purchase InstaDial shares, can fairly be said to have been made "with the intention of effecting a trade" in InstaDial shares.

**(c) Market Listing and Market Price**

[148] Part of the sales pitch for InstaDial shares was the attractive offering price of C\$2.50 for a share supposedly trading at a considerably higher price on a market in the United States. The information about this apparent United States trading was conveyed to prospective investors orally, as part of the telephone solicitation, and in writing through material that included a trading chart accompanied, without clear explanation, by the name or logo "NASDAQ".

[149] There was clearly a representation being made that the InstaDial offering price was below a price prevailing in a United States marketplace. We find that investors were deliberately given the impression that they could expect to profit from that price difference by reselling at a market price above their cost of the shares.

[150] All of this information was conveyed to prospective investors as part of the distribution of InstaDial shares and done so with the intention of effecting trades. We believe that each of Smith, Allen, Atwell and Kabir – each of whom we have found to bear responsibility for the marketing effort – also bore responsibility for conveying this information to investors.

[151] The information could involve three types of conduct prohibited by section 92 of the Act. We consider each in turn.

**(i) Market Listing (paragraph 92(3)(b))**

[152] Staff alleged prohibited representations or misrepresentations as to the listing of InstaDial shares on the New York Stock Exchange ("NYSE") or NASDAQ. There was no evidence of any representation about a NYSE listing. However, the trading charts and oral information described in testimony gave the unmistakable impression that InstaDial shares traded in the United States on a marketplace affiliated in some way with NASDAQ. There was no direct evidence of InstaDial shares being listed on NASDAQ. On the other hand, there was nothing in the evidence that disproved the existence of trading or quotation of InstaDial shares on a NASDAQ-affiliated system.

[153] Thus, there is no basis for us to conclude that InstaDial shares were not listed or quoted on such a marketplace at the time. It follows that we have no basis to conclude that the Executive Director's written permission was required for any representation to that effect. This means that there is no basis to find a contravention of paragraph 92(3)(b) on this ground.

**(ii) Price Undertaking (paragraph 92(3)(a))**

[154] As noted, investors were deliberately left with the impression that they might anticipate reselling their InstaDial shares at a profit. A key piece of support for that impression was the purported higher price range in which the shares were then allegedly trading in the United States.

[155] As also noted, the Act prohibits certain undertakings as to future value or price. The Act does not define "undertaking". However, in this context we believe that "undertaking" connotes rather more than an "impression", however persistently conveyed. For the purpose of paragraph 92(3)(a), we would look for something stronger than an impression and more clearly indicative of intention and commitment such as a promise, guarantee or contractual covenant. There was no evidence of that nature here.

[156] We do not find that the Respondents gave an undertaking as to the future value or price of InstaDial shares and therefore we do not find a contravention of paragraph 92(3)(a).

**(iii) Price Related to Market Price (paragraph 92(3)(c); subsection 92(4))**

[157] We noted above that part of the marketing pitch in the InstaDial distributions was the comparison between the C\$2.50 offering price and the higher prices apparently prevailing in United States trading. This, we conclude, amounted to a representation by Allen, Atwell and Kabir that they were offering to trade InstaDial shares at a price related to (and more attractive than) the market price.

[158] That by itself is not prohibited. What subsection 92(4) of the Act prohibits is a representation of this nature made without a reasonable belief in the existence of a market

"not made, created or controlled" by that person or his associates. Alternatively, paragraph 92(3)(c) prohibits a "misrepresentation" made "with the intention of effecting a trade".

[159] The very fact that a concerted and persistent effort was made over the course of several months to sell InstaDial shares at a price markedly lower than that supposedly prevailing at the same time in a United States market raises questions. If there really was such a market, and real market demand at higher prices, why not either distribute directly into that market or set the Canadian distribution price closer to that supposed market level?

[160] Staff's allegation seems to answer those questions by implying that there really was no such market or that, if there were a market, it was an artificial creation by the Respondents.

[161] However, the evidence to support this suggestion was scant. As indicated, such evidence as there was tended to demonstrate that there actually was a market of some sort in the United States for InstaDial shares and that trading, however thin, was occurring. An illiquid market might be susceptible to manipulation, but it is not evidence of manipulation. There was no evidence that such market as existed was "made, created or controlled" by the Respondents or their associates or, indeed, by anyone else. Nor was there any evidence that any of the Respondents doubted the existence of the market or suspected that it had been so "made, created or controlled". Finally, there was no evidence of a "misrepresentation" on this point.

[162] There is no evidentiary basis for us to find on this ground that there had been a representation prohibited by subsection 92(4) of the Act or a misrepresentation prohibited by paragraph 92(3)(c). We find that this allegation is not proved.

#### **(iv) Conclusion on Market Listing and Market Price**

[163] Based on the above analysis, we are not persuaded from the evidence that the Respondents made prohibited representations, misrepresentations or undertakings relating to InstaDial shares being listed or quoted on a marketplace or to the value or price of InstaDial shares. Those grounds of Staff's allegations are not sustained.

#### **(d) Restricted Resale Period (paragraph 92(3)(c))**

[164] All of the investors from whom we heard believed, incorrectly, that it was only a matter of time (one year or less) before they would be able to resell their InstaDial shares. They testified that had they known that their shares would be subject to an indefinite resale restriction, they would not have bought.

[165] The Respondents ought to have known about the indefinite resale restriction. Certainly, they could have learned of it by consulting MI 45-102. In fact, the share

certificates issued after the shares were sold bore a legend describing a resale restriction with a duration tied to the issuer's reporting issuer status. This suggests that at least some of the Respondents knew the truth. A legend on a share certificate issued after a share sale would not, of course, undo the effect of misinformation at the time of the sale.

[166] We believe that an indefinite hold period and its inevitable consequence for the liquidity of the affected security would clearly, in the ordinary course, be reflected in the amount people would be willing to pay for the security or their willingness to buy at all – as the testimony of the investor witnesses confirmed – and thus would "significantly [affect] or would reasonably be expected to have a significant effect on the market price or value of the securities".

[167] We therefore find that the existence of the indefinite hold period was a "material fact".

[168] We further find that the investors' understanding as to the duration of the resale restriction came from their conversations with one or more of Allen, Atwell and Kabir. In some instances the misinformation was conveyed by a positive misstatement. In other cases, there may have been an omission – a failure to make a statement necessary to avert or correct a prospective investor's misunderstanding about this material fact.

[169] We therefore find that these were misrepresentations made by Allen, Atwell and Kabir in the course of a distribution "with the intention of effecting a trade" in InstaDial shares and that in each case this was contrary to paragraph 92(3)(c) of the Act.

**(e) Accredited Investor Exemption (paragraph 92(3)(c))**

[170] The seller of a security, not the buyer, requires registration and a prospectus, or an exemption. It is thus the seller, not the buyer, who needs to ensure that any exemption relied upon is, in fact, available. A seller must not make a misrepresentation to an investor about an exemption.

[171] Here, investors were given information about the terms, the availability or the importance of the accredited investor exemption.

[172] For example, EEE testified that his concerns about not fitting within any of the branches of the accredited investor category identified in his subscription documents were minimized by "Ivan". According to EEE, whom we believe, Ivan responded that EEE should pick the category that was closest to the truth and that the requirement was merely for internal paperwork. That was untrue. No "Ivan" was named as a Respondent but the sales activity, and EEE's subscription documentation, involved the same Toronto contact information as for several of the Respondents. The information given was, we conclude, part of the same selling effort guided by Allen.

[173] The subject also came up when investor FFF told Smith that he, FFF, was not an accredited investor. We believe FFF's testimony that Smith reassured FFF that InstaDial was legally allowed a certain number of non-qualifying investors. That reassurance was misleading and untrue.

[174] Finally, the issue of the availability of the accredited investor exemption came up on several occasions when inexperienced, unsophisticated investors were presented with legal-looking subscription documents that they were instructed to sign. In the majority of the cases, the documents included a handwritten notation specifying a category of the accredited investor exemption for the particular investor – a notation entered before or after the investor signed and returned the document but not entered by the investor. While that notation was cast as a representation by the investor to the sellers, we have already concluded that that portrayal was essentially a sham.

[175] In our view, the substance of what happened in the case of all of the investors who testified before us was similar. They were given some paper to sign and return. They did so, in most cases without giving much attention to the text. In effect, whatever the words might say, the subscription documents handled in this fashion with these investors were merely part of the sales package and the marketing pitch. Any reference in these documents to an investor's qualification as an accredited investor was more a representation by the sellers than by the investor.

[176] We also believe that the sellers were in a position to correct apparent misapprehensions on the part of an investor as to his or her qualification as an accredited investor, such as might be suggested by an apparent discrepancy between information conveyed by telephone and the information appearing (irrespective of who entered it) in the completed subscription documentation. In the case of at least five of the six investors we heard from (investor BBB being the possible exception, as discussed earlier), there were such discrepancies. They were not corrected.

[177] We conclude that the sellers of the InstaDial shares made positive representations and also omitted to correct apparent misinformation relating to the accredited investor exemption and the qualification of particular investors.

[178] Did the representations or omissions relate to a "material fact"? If they did not, there was no "misrepresentation". The question can, we believe, be answered quite simply. If an investor did not qualify as an accredited investor, given that this was the only exemption being relied upon, then that investor was legally excluded from investing. Selling to such investors made the distributions illegal. Knowledge of the illegality of a transaction would, in our view, reasonably be expected to have a significant effect on the amount that investors would be willing to pay (a law-abiding investor presumably being unwilling to pay any amount at all in an illegal transaction) and hence on the value of the security offered in that transaction. We also believe that market knowledge of an illegal

distribution would reasonably be expected to have a significant negative effect on the value of the securities. Analyzed either way, the illegality of the distributions by reason of investors not being accredited was, we find, a material fact. Both positive representations and omissions to correct other misstatements on that subject were, therefore, misrepresentations.

[179] Responsibility for these misrepresentations was shared among:

- the front-line selling personnel Atwell and Kabir, who seem to have had the most direct contact with investors;
- Allen, who had some direct contact with investors and whom we found to have been the guiding mind behind the selling efforts as a whole;
- Smith, who also had some direct communication with investors on this topic and whom we also found to bear responsibility for the distributions generally; and
- InstaDial itself, the securities of which were being distributed.

[180] For these reasons, we find that each of the Respondents made prohibited misrepresentations to investors concerning the accredited investor exemption and individual investors' qualification as accredited investors. We further find that this was done with the intention of effecting trades in InstaDial shares and was therefore contrary to paragraph 92(3)(c) of the Act.

**(f) Conclusion on Misrepresentations and Prohibited Representations to Investors**

[181] Not all of the grounds that Staff put forward in support of their allegations concerning misrepresentations and prohibited representations are sustained. However, we are satisfied that each of the Respondents made misrepresentations to investors by positive statement or by omission. We find Allen, Atwell and Kabir each responsible for such misrepresentations concerning the restricted resale period applicable to InstaDial shares sold in the distributions. We find all of the Respondents responsible for such misrepresentations pertaining to the accredited investor exemption and particular investors' qualification as accredited investors.

[182] In each case where we found misrepresentations, they were made with the intention of effecting a trade in InstaDial shares and therefore contravened paragraph 92(3)(c) of the Act.

#### **4. Misrepresentations in Filings**

[183] Staff alleged that Smith and InstaDial acted contrary to the public interest by making misrepresentations in documents required to be filed with the Commission under Alberta securities laws.

[184] A "report of exempt distribution" was required to be filed with the Commission under Part 7 of MI 45-103 for a distribution made in reliance on the accredited investor exemption. InstaDial filed such distribution reports under Smith's signature. The reports indicated reliance on the accredited investor exemption.

[185] We have found that this exemption was unavailable for some of those distributions and that the distributions were illegal. The distribution reports thus contained misrepresentations.

[186] It is clear to us that responsibility for those misrepresentations is borne both by InstaDial (whose reports they were) and by Smith as director and officer of InstaDial and as signatory of the reports.

[187] We find that this allegation against InstaDial and Smith is proved. We address the public interest aspect of the allegation below.

#### **5. Acting as Unregistered Advisors**

[188] Staff alleged that each of Atwell, Kabir and Allen acted as securities advisors, without being registered as required by paragraph 75(1)(b) of the Act. There was little argument or evidence on the point.

[189] It is clear to us that the entire distribution effort was persistent. It is also clear that Allen, Atwell and Kabir sought to convince the targeted investors to buy InstaDial shares, each of them responding to investors' questions or doubts with information, encouragement and reassurance.

[190] Subsection 1(a) of the Act defines an advisor as "a person or company engaging in or holding out the person or company as engaging in the business of advising others with respect to investing in" securities. Allen, Atwell and Kabir were certainly trading and distributing InstaDial shares. It remained to be demonstrated that their activity crossed the boundary into the business of advising.

[191] Staff asserted that these three Respondents did exactly that. In support of their assertion, Staff argued that these three Respondents recommended the purchase of InstaDial shares, provided targeted investors with information and solicited second investments from certain investors.

[192] We agree that Allen, Atwell and Kabir each engaged in one or more of these acts. That leaves us, though, with little more than the inference that such acts amount to the "business of advising". Without more, we are unable to determine whether that inference is correct.

[193] We therefore make no finding on whether these three Respondents contravened the Act by acting as advisors without being registered to do so.

## **6. Conduct Contrary to the Public Interest**

[194] As we have seen, Staff alleged numerous breaches of Alberta securities laws and also alleged that each such breach involved conduct contrary to the public interest. These are two distinct types of allegation. The distinction is important because our task is twofold: to determine whether allegations are proved and, if so, to assess whether it is in the public interest to make any orders against any Respondent.

[195] Conduct may be contrary to the public interest even though no specific contravention of Alberta securities laws is proved. Conversely, it may be possible to contravene a provision of Alberta securities laws without acting contrary to the public interest.

### **(a) Allegations Not Proved**

[196] In respect of the allegations that were not proved, we heard no argument to support a finding that there had, nevertheless, been conduct contrary to the public interest. We make no such finding.

### **(b) Contraventions Proved**

[197] In respect of the contraventions that were proved, we find that each involved conduct contrary to the public interest for the following reasons.

[198] The registration and prospectus requirements are fundamental to the regulation of securities trading in Alberta and across Canada. A distribution in contravention of those requirements deprives investors of the protections and the information those requirements are designed to provide. Such contraventions are unfair to the affected investors and to competing issuers who do comply with the law. Those contraventions also call into question the integrity of securities offerings generally and jeopardize market confidence.

[199] Similarly, misrepresentations to an investor affect not only the investor's private welfare but the fairness, efficiency and integrity of the capital market as a whole. By harming or putting at risk identifiable investors, those responsible for misrepresentations undermine investor confidence generally.

**(c) Misconduct Without Specific Contravention**

[200] Concerning the allegation that InstaDial and Smith made misrepresentations in filed documents, Staff did not allege a specific contravention of Alberta securities laws but they did allege that the conduct was contrary to the public interest. We agree. Such conduct misinforms both regulators and the market as a whole. This, too, undermines market efficiency, integrity and confidence and is therefore clearly contrary to the public interest.

**(d) Conclusion on Public Interest**

[201] We have found that each of the Respondents engaged in illegal trades and distributions of InstaDial shares and made misrepresentations to investors. We also found that Smith and InstaDial made misrepresentations in mandatory filings with the Commission. In all of that conduct, we find that each Respondent acted contrary to the public interest.

**VI. STOCK DIVIDEND**

[202] In addition to the allegations pertaining to the sales of InstaDial shares, Staff alleged that InstaDial and Smith contravened a Commission cease trade order by issuing a stock dividend, and that this contravention was also contrary to the public interest.

**A. The Facts**

[203] As indicated earlier, the Commission issued the Cease Trade Order on an interim basis on 21 January 2005 under sections 33 and 198 of the Act to protect the investing public and the integrity of the Alberta capital market in the face of *prima facie* evidence of misconduct. On 4 February 2005 the Cease Trade Order was extended until the conclusion of the Hearing and the issuance of this decision. Among other things, the Cease Trade Order prohibited all trading in securities of InstaDial, barred Smith from trading in any securities and denied InstaDial and Smith the use of any exemptions under Alberta securities laws.

[204] After the Cease Trade Order had been issued, InstaDial provided its shareholders with what appeared to be a news release dated 18 February 2005 announcing a stock dividend in the proportion of one additional InstaDial share for each share held on the 18 March 2005 record date. Each of the six investors who testified before us received this dividend and a certificate evidencing the additional shares. They paid nothing for the additional shares.

[205] There was no evidence before us as to the nature of this stock dividend or what it meant in economic terms for the recipients. We have no information as to what prompted the declaration of this stock dividend. In practical terms, it might amount to nothing more than a two-for-one stock split. The characterization as a dividend, however, seems to have had a positive connotation for at least some investors. Investor BBB, for example, referred to it as a "bonus".

## **B. Legal Nature of the Stock Dividend**

### **1. Issues for Determination**

[206] To conclude that there was a contravention of the Cease Trade Order as alleged, we must make two findings. First, the declaration of the dividend or the issuance of shares in payment of the dividend must have amounted to either a trade (the Cease Trade Order prohibited trading) or some other activity for which an exemption was relied upon (the Cease Trade Order also denied the use of exemptions). Second, InstaDial or Smith must have been responsible for the stock dividend.

[207] In the absence of any contrary evidence, we must logically conclude that the responsibility for InstaDial's declaration of a dividend and the issuance of treasury shares in payment of the dividend rested with the company itself and with its sole officer and director.

[208] The only likely relevant exemptions would be the registration exemption for stock dividend trades set out in paragraph 86(1)(m) of the Act and the prospectus exemption for stock dividend distributions set out in paragraph 131(1)(f) (together, the "Stock Dividend Exemptions", as they read in February 2005). There being no registration or prospectus, Smith and InstaDial would have had to rely on one or both of the Stock Dividend Exemptions (contrary to the Cease Trade Order) if the stock dividend involved either a trade or a distribution. As noted earlier, a trade in newly-issued shares is also a distribution. The issue for determination can thus be reduced to this: did the stock dividend involve a trade?

[209] Smith and InstaDial in their written "closing submission" argued that the stock dividend was not a trade and hence that there was no contravention of the Cease Trade Order.

### **2. Statutory Exemptions Not Determinative**

[210] In support of their allegation of a breach of the Cease Trade Order, Staff relied in part on the very existence of the Stock Dividend Exemptions. They argued, in effect, that the fact that the Act granted exemptions for stock dividends was conclusive evidence that a stock dividend will necessarily involve a trade (and by extension, a distribution) that would otherwise require the involvement of a registrant and a receipted prospectus.

[211] We disagree. The fact that the Act provided exemptions for a stock dividend is consistent with the view that a stock dividend *could* involve a trade. That is not conclusive evidence that a stock dividend generally, or this InstaDial stock dividend in particular, *necessarily* involves a trade.

### **3. Sale or Disposition for Valuable Consideration**

[212] Our analysis must begin with first principles. Subsection 1(jjj) of the Act describes a number of acts, any of which constitutes a "trade". Only two of these are, in our view, potentially relevant to this case: a "sale or disposition of a security for valuable consideration"; or an act "in furtherance of" another act that itself constitutes a trade. The issue thus becomes whether the stock dividend involved a sale or disposition of a security for valuable consideration or an act in furtherance of such a sale or disposition.

[213] We know that none of the investor witnesses paid anything for their stock dividend and there was no evidence of anyone else having done so. But consideration can also be non-monetary (*Re Seto*, [2003] A.S.C.D. No. 270). In *Seto*, stock options were found to have been issued for consideration even in the absence of a cash payment, "as both a reward and an incentive to their directors, management and employees [recipients of the options] for their present and future services to the company" (at para. 28).

[214] Staff contended that the InstaDial stock dividend was analogous to the *Seto* stock options but provided no evidence of a parallel between the two cases nor any other evidence of valuable consideration for the InstaDial stock dividend. We agree that there could be circumstances in which valuable consideration is exchanged for a stock dividend and that, as in *Seto*, such consideration might be non-monetary. However, without evidence there is no basis for us to find that this was such a case.

[215] Nor was there any evidence that the stock dividend was an act "in furtherance of" another trade and we will not speculate.

[216] There being no evidence of valuable consideration for the stock dividend and no evidence that it involved an act in furtherance of a trade, we have no basis for concluding that the stock dividend constituted or involved a trade nor that any exemption under Alberta securities laws was necessary to accommodate the stock dividend.

[217] Accordingly, we do not find that the stock dividend contravened the Cease Trade Order. It follows that the related allegation, that Smith and InstaDial acted contrary to the public interest by issuing the stock dividend in contravention of the Cease Trade Order, is also not proved.

## **VII. SANCTION**

### **A. Staff Position**

[218] Staff asked that we order a number of sanctions against each Respondent, as follows:

- against InstaDial: indefinite cease trade and denial-of-exemptions orders and a \$50 000 administrative penalty;

- against Smith: three-year cease trade and denial-of-exemptions orders, a three-year director-and-officer ban and a \$15 000 administrative penalty;
- against Allen: five-year cease trade and denial-of-exemptions orders and a \$20 000 administrative penalty; and
- against each of Atwell and Kabir: three-year cease trade and denial-of-exemptions orders and a \$15 000 administrative penalty.

[219] In addition to these sanctions, Staff sought orders that the Respondents pay a significant portion of the costs of the investigation (aggregating approximately two thirds of the \$33 500 total shown in the bill of costs), allocated as follows: InstaDial, \$7 500; Smith, \$5 000; Allen, \$5 000; Atwell, \$2 500; and Kabir, \$2 500.

## **B. Legal Considerations Relevant to Sanction**

### **1. Sanctioning Principles**

[220] This Commission has had frequent occasion to comment on the principles relevant to sanctioning misconduct in the capital market. In *Re Dobler*, 2004 ABASC 1178, the Commission said (at para. 14):

[14] Our orders are to be prospective, not retrospective. As this Commission recently said in *Re Podorieszch*, 2004 ABASC 567 (at para. 17, referring also to decisions of the Supreme Court of Canada in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 and *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132):

Any orders we make are to be ... preventative and protective, not punitive or remedial. In determining the need for such orders we consider the need to prevent a recurrence of misconduct both by the particular respondent (specific deterrence) and by others (general deterrence).

[221] We apply those principles here.

### **2. Sanctioning Factors**

[222] In *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11, the Commission set out a non-exhaustive list of specific factors that may be relevant in the assessment of the orders appropriate in a particular case. Many of those factors are relevant in these proceedings and we consider them in turn.

#### **(a) Seriousness**

[223] The Respondents each played a part in the illegal distributions. This was not a "technical" breach or oversight. The prospectus and registration requirements are core elements of Alberta securities laws, designed to protect investors. Exemptions are available, but on strict conditions designed to ensure that investor protection is maintained. We found that the Respondents made no serious effort to adhere to those

conditions. Misrepresentations were made – to investors and to the Commission – about those legal requirements and compliance with them.

[224] This was serious misconduct.

**(b) Past Conduct, Experience and Record**

[225] There was no evidence of a history of past misconduct or sanction against any of the Respondents nor (with the exception of Allen and the limited evidence concerning his hiring of Kabir) of any history of other involvement in the capital markets.

[226] As noted, apparently Allen was once a registrant under Ontario securities laws but denied reinstatement in that capacity. We consider it relevant that he was formerly a registrant under securities laws substantially similar to our own. We attach no weight to his having been denied reinstatement, however, because we do not have evidence on that point relevant to the case before us.

[227] There came to our attention late in these proceedings the existence of an unconnected proceeding in Ontario against Allen, among others, for alleged breaches of Ontario securities laws. A decision was rendered in that case, and made public, after the conclusion of Staff's case and closing arguments but before our issuance of this decision and reasons. Staff did not enter that decision into evidence but they did tender an extract from a transcript from that Ontario proceeding which was entered into evidence. As we discussed, we found confirmation there concerning the identity of one of the Respondents in this case. That narrow purpose was the only purpose for which that evidence was used. We considered that it could be potentially prejudicial, and therefore inappropriate, to rely on information gleaned from the Ontario proceedings in our consideration of the primary legal issues before us in this case.

[228] Accordingly, apart from the narrow issue of confirmatory identification of one Respondent, the Ontario proceedings played no part in our assessment of the case before us. We gave no consideration to the decision ultimately rendered in that Ontario proceeding.

**(c) Mitigating Factors**

[229] We found nothing in the evidence that mitigates the misconduct of any of the Respondents or the harm that resulted.

[230] Although not strictly a mitigating factor, we considered whether sanctions against InstaDial itself might indirectly compound the harm to which its public investors have already been exposed and, if so, whether that might outweigh other considerations that tend to favour sanctions. We determined that this was not such a case. InstaDial as an issuer must bear its full measure of responsibility for the contraventions and misconduct here. Its Alberta investors are left holding effectively unsaleable securities, and this is so

irrespective of whether or what sanctioning orders we make. We do not find anything that would outweigh a determination to order sanctions against InstaDial for other reasons.

**(d) Recognition of Seriousness**

[231] There was no evidence that any of the Respondents recognized or acknowledged the seriousness of their misconduct or the consequences for investors and the Alberta capital market. We heard nothing at all from Allen, Atwell or Kabir. Smith and InstaDial made some representations in writing but offered no acknowledgement or recognition that any wrong was done.

**(e) Harm Suffered**

[232] A good deal of money was invested by Alberta investors in the InstaDial distributions.

[233] As indicated earlier, we know very little about InstaDial. We do know that the shares it sold were and remain subject to an indefinite resale restriction. There was no evidence of any action on the part of InstaDial to become a reporting issuer and thereby bring that hold period to an end. In consequence, quite apart from the Cease Trade Order or any sanction we might order, the investors might never be able to resell their shares.

[234] Thus, Alberta investors ended up with highly (perhaps wholly) illiquid securities. An investor's inability to resell the shares could make them worthless to that investor even if there were a United States market and an apparent market value.

[235] The investors we heard from certainly did not know of the indefinite resale restriction when they paid for their InstaDial shares. The amounts were not insignificant to them.

[236] It is clear to us that the illiquidity of their InstaDial Shares has harmed Alberta investors financially. The testimony we heard also demonstrated that there has been harm to identifiable investors' confidence in the fairness of the capital market. We do not believe that the loss of confidence was limited to these six investors. The Respondents also put at risk the integrity of the Alberta capital market as a whole and investor confidence in that market. That in turn exposed to harm yet other investors, as well as companies seeking to raise capital for their businesses.

**(f) Benefits to Respondents**

[237] There was, as we have noted, no evidence as to whether or to what extent any Respondent benefited financially from the InstaDial distributions.

[238] A considerable amount was raised from Alberta investors in these distributions. We think it likely that all of the Respondents benefited financially, or at least expected to

benefit financially, from their actions. However, in the absence of evidence we can reach no conclusion on this point.

**(g) Risk of Future Harm**

[239] We commented above on the harm done in this case. In our view, the apparent success of the InstaDial distributions presents a considerable risk that these Respondents or other parties may be tempted to engage in similar behaviour in future and so expose Alberta investors and our capital market to future harm.

[240] In addition, the Respondents' actions potentially jeopardize the viability of our system of registration and prospectus exemptions. The accredited investor exemption – with its associated limitations and conditions – was implemented by securities regulators because it was considered both fair and useful. Misuse of the exemption not only jeopardizes the direct victims (as discussed) but could also call into question the very future of that exemption (and perhaps others as well). Deserving issuers and qualifying investors could both be harmed. The efficiency of the capital market could be impaired.

**(h) Need to Alert and Deter**

[241] We believe that a strong message to these Respondents is necessary to deter them from repeating the harm they have done. "Specific deterrence" is necessary and appropriate here.

[242] We also see a need for a clear measure of "general deterrence". To deter misconduct such as this, we believe that other market participants must understand that it is taken seriously and sanctioned effectively.

**(i) Previous Decisions**

[243] Staff put forward several previous decisions to assist in our determination on sanction. As is so often the case, though, the sanction appropriate in any case is dependent on the circumstances of that case. It may also be that, over time, the use or extent of any particular type of sanction might vary as the need to deter particular types of activity changes.

[244] At most, what we glean from prior decisions is that a bundling of different sanctions, as suggested here by Staff, can have a complementary and positive result.

**(j) Conclusion on Sanctioning Factors**

[245] This is a case of serious contraventions of Alberta securities laws and conduct contrary to the public interest. Individuals of comparatively modest means were exposed to the loss of money they had worked for. The Respondents harmed Alberta investors. Capital market integrity and confidence were put at risk.

[246] There was no evidence that any of the Respondents recognized or acknowledged their misconduct or the resulting harm. There was no evidence as to whether or to what extent the Respondents benefited from their misconduct, but there were also no mitigating factors.

[247] We find a risk of future harm from similar conduct by these Respondents or by other parties, and a need to deter such a recurrence.

## **C. Conclusions as to Appropriate Sanction**

### **1. General Approach to Sanctions in This Case**

[248] We have noted that sanctioning orders we make are to be prospective and protective, but not punitive. Bearing this in mind, we conclude that this is a case that demands measures to protect the Alberta capital market and Alberta investors from a recurrence of the Respondents' misconduct, either by the Respondents themselves (specific deterrence) or by others who might be tempted to engage in similar misconduct (general deterrence). We believe that the requisite message of specific and general deterrence requires significant sanctions against each Respondent.

[249] We conclude that the appropriate protective sanctions should remove all of the Respondents from our capital market and also require them to make monetary payments. The exclusionary orders provide an obvious element of protection. A monetary sanction is also an important element of both specific and general deterrence in this case.

[250] We disagree with Staff's view as to the quantum of certain sanctions appropriate for two of the Respondents. It is our belief that both Smith and Allen acted with such disregard for Alberta securities laws, Alberta investors and the Alberta capital market that a stronger message than suggested by Staff should be sent to those Respondents and to market participants generally.

[251] We now discuss the appropriate sanctions in more detail.

### **2. Specific Elements of Sanction**

[252] InstaDial, we believe, should be removed from the Alberta capital market and it should pay a significant monetary administrative penalty. While that financial penalty might be said to affect existing shareholders, including many who are themselves innocent of wrongdoing, it must be remembered that our objective is prospective and protective. We want to deter this company, and others who might be inclined to act as InstaDial did, from repeating similar misconduct to the detriment of future investors. Concerning trading sanctions, our objective is similarly to protect other investors from being enticed into a distribution without the protection offered by prospectus disclosure. We think it necessary and appropriate to bar InstaDial indefinitely from trading or distributing securities and from purporting to rely on exemptions without first filing and

obtaining a receipt for a prospectus. If InstaDial does not follow that avenue, we consider it appropriate for these trading sanctions to be permanent.

[253] We consider Allen and Smith to be the primary actors in this case and we therefore believe that each should be removed from the Alberta capital market for a lengthy period and pay a substantial administrative penalty.

[254] As between the two men, we consider Allen's role to have been the more serious. He was, in our view, the orchestrator of the high-pressure selling efforts. Further, his previous registration under Ontario securities laws means that he surely knew the importance of informing oneself about, and adhering to, securities laws. He would have known that exemptions are required for trades and distributions without registration or a prospectus. He should have had a basic understanding of the investor protection principles behind those requirements and that those who seek to rely on an exemption must ensure that the conditions of such exemption are satisfied. We note that the documentation prepared in connection with the InstaDial distributions demonstrates both an awareness of these legal requirements and restrictions and an effort to present the appearance of compliance, without any serious regard for actual, substantive compliance. For these reasons, we believe that Allen warrants sanctions greater than those appropriate for Smith and greater than suggested by Staff.

[255] That is not to diminish either Smith's responsibility or the sanctions he merits. He bears responsibility as a corporate director and officer. He also dealt directly with at least one investor, giving false information about securities law aspects of the distributions. He signed and filed misleading reports with the Commission. His actions amounted to serious and inexcusable misconduct. We believe that Smith merits sanctions somewhat greater than suggested by Staff but (for the reasons indicated) less extensive than those appropriate for Allen. Moreover, given that Smith was acting as a corporate officer and director – roles of considerable importance in both corporate and securities laws – we believe that Smith should also be excluded from acting in those capacities in Alberta for a significant period.

[256] As to Atwell and Kabir, we believe that they both acted under the direction of Allen. Nonetheless we are in no doubt that both men acted deliberately. We think it likely that they did so with a view to some sort of personal benefit. The circumstances were such that even the most naive salesperson should have at least wondered at the propriety, as well as the legality, of the process in which they were engaged. Their unscrupulous behaviour, in our view, merits exclusion from the Alberta capital market and payment of an administrative penalty. However, given our finding that their roles were subordinate to Allen's, we think that the appropriate exclusionary period and the amount of the administrative penalty for Atwell and for Kabir should be less than those imposed on Allen. We accept Staff's submissions on this matter.

[257] Given the difficulties faced by Staff in effecting service on Atwell and Kabir, we recognize that similar difficulty may arise in serving and enforcing our orders on them. That does not alter our conclusion that the sanctions we order below are in the public interest.

#### **D. Costs**

[258] We believe that each Respondent should also make a contribution toward the costs of the investigation.

[259] Costs were incurred to investigate activity which Staff have proved involved serious misconduct and resulting harm. We believe that this justifies orders for payment of a significant portion of costs unless there are compelling mitigating factors. There are none here.

[260] It is true that not all of the allegations against the Respondents were proved. In appropriate cases such an outcome may affect the quantum of costs ordered. Here, though, we believe that the overriding factors are the seriousness of what was proved and the fact that the Respondents were almost wholly unresponsive to the proceedings and did nothing to facilitate the resolution of this matter.

[261] In our view, these Respondents do not deserve any special consideration on the matter of costs. We accept Staff's submissions as to appropriate costs orders.

### **VIII. ORDERS**

[262] For the foregoing reasons, we make the following orders in the public interest.

[263] Against InstaDial, we order:

- under paragraph 198(1)(b) of the Act, that it cease trading in any security unless and until it has filed a prospectus in Alberta and obtained a receipt therefor;
- under paragraph 198(1)(c) of the Act, that all of the exemptions contained in the Alberta securities laws do not apply to it unless and until it has filed a prospectus in Alberta and obtained a receipt therefor; and
- under section 199 of the Act, that it pay an administrative penalty of \$50 000.

[264] Against Allen, we order:

- under paragraph 198(1)(b) of the Act, that he cease trading in any security for ten years;
- under paragraph 198(1)(c) of the Act, that all of the exemptions contained in the Alberta securities laws do not apply to him for ten years; and
- under section 199 of the Act, that he pay an administrative penalty of \$30 000.

[265] Against Smith, we order:

- under paragraph 198(1)(b) of the Act, that he cease trading in any security for five years;
- under paragraph 198(1)(c) of the Act, that all of the exemptions contained in the Alberta securities laws do not apply to him for five years;
- under paragraphs 198(1)(d) and (e) of the Act, that he resign any position that he holds as a director or officer of an issuer in Alberta and that he is prohibited from becoming or acting as a director or officer of any issuer in Alberta for five years; and
- under section 199 of the Act, that he pay an administrative penalty of \$25 000.

[266] Against Atwell, we order:

- under paragraph 198(1)(b) of the Act, that he cease trading in any security for three years;
- under paragraph 198(1)(c) of the Act, that all of the exemptions contained in the Alberta securities laws do not apply to him for three years; and
- under section 199 of the Act, that he pay an administrative penalty of \$15 000.

[267] Against Kabir, we order:

- under paragraph 198(1)(b) of the Act, that he cease trading in any security for three years;
- under paragraph 198(1)(c) of the Act, that all of the exemptions contained in the Alberta securities laws do not apply to him for three years; and
- under section 199 of the Act, that he pay an administrative penalty of \$15 000.

[268] We also order, under section 202 of the Act and subject to the regulations, payments toward the costs of the investigation, as follows:

- by InstaDial – \$ 7 500;
- by Smith – \$5 000;
- by Allen – \$5 000;
- by Atwell – \$2 500; and
- by Kabir – \$2 500.

[269] With this decision, the outstanding Cease Trade Order made on 21 January 2005 and extended on 4 February 2005 has now expired in accordance with its terms.

[270] These proceedings are concluded.

[271] 07 December 2005

[272] **For the Commission**

**“Original Signed By”**

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Stephen R. Murison, Vice-Chair

**“Original Signed By”**

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David W. Betts, CFA, Member

**“Original Signed By”**

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Roderick J. McLeod, Q.C., Member